1992

Thomas Donahue v. Grace Donahue Parish : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THOMAS DONAHUE, Plaintiff and Appellant, vs. GRACE DONAHUE PARISH, Defendant and Appellee.	BRIEF OF APPELLANT Priority No. Case No. 920500-CA

Appeal From the First District Court. Cache County, Judge Gordon J. Low.

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STATEMENT OF JURISDICTION

This is an appeal from a final Order of the District Court for the First Judicial District of the State of Utah, in and for Cache County. The Court of Appeals has jurisdiction because the appeal was assigned to it by the Utah Supreme Court pursuant to the Utah Code Annotated §78-2a-3.

ISSUES FOR REVIEW AND STANDARD OF REVIEW

Should the term "proceeds" as used in the Washington State Decree of Dissolution be interpreted to include the total amount received by Parish under a Real Estate Purchase Contract for the sale of the parties' home and is Donahue entitled to one-half (1/2) of the total amount received by Parish under the Promissory Note and Contract?

Does Utah law permit the Trial Court to apply the Washington State statutory prejudgment interest of twelve percent (12%) to a judgment which is rendered and entered in Utah, or should Utah statutory prejudgment rate of ten percent (10%) be applied?

Should the Trial Court have allowed Donahue to call Rex Fuhriman as a witness to explain to the Trial Court his expert interpretation of the term "proceeds?"

The standard of review concerning each of these issues is the correctness of the Trial Court's ruling. See Mountain Fuel Supply v. Salt Lake City, 752 P.2d 884, 887 (Utah 1988) and Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985).

STATUTES AND RULES

The following statutes and rules are subject to interpretation by this Court:

Section 15-1-1(2), Utah Code Annotated (1953):

> (2) Unless parties to a lawful contract specify a different rate of interest, the legal rate of interest for the loan or forbearance of any money, goods, or chose in action shall be ten percent (10%) per annum.

19.52.010 (1), Revised Code of Washington:

> (1) Every loan or forbearance of money, goods, or thing in action shall bear interest at the rate of twelve percent per annum where no different rate is agreed to in writing between the parties: *Provided,* That with regard to any transaction heretofore or hereafter entered into subject to this section, if an agreement in writing between the parties evidencing such transaction provides for the payment of money at the end of an agreed period of time or in installments over an agreed

> period of time, then such agreement shall constitute a writing for purposes of this section and satisfy the requirements thereof. The discounting of commercial paper, where the borrower makes himself liable as maker, guarantor, or indorser, shall be considered as a loan for the purposes of this chapter.

STATEMENT OF CASE

NATURE AND COURSE OF THE CASE

Thomas Donahue, Plaintiff and Appellant, brought an action against Grace Parish, Defendant and Appellee, for fraud, declaratory judgment and division of proceeds from the sale of the parties' home in Logan, Utah. Donahue and Parish were divorced in Washington on October 20, 1980. The Decree of Dissolution divided several properties of the parties located in Cache County, Utah. Donahue's actions against Parish for fraud and declaratory judgment were dismissed on summary judgment by the District Court. Donahue's claim for the division of proceeds from the sale of the Logan home was reserved for trial. Parish counterclaimed for unpaid alimony and a trial was held in the First Judicial District Court, Cache County, Utah on December 17, 1991.

The Trial Court determined that the "proceeds" as set forth in the Washington State Decree of Dissolution meant the purchase price on the date the house in Logan, Utah was sold and did not include the interest income on the sale proceeds pursuant to the Real Estate Contract. The Trial Court also ruled that the Washington State statute concerning prejudgment

interest of twelve percent (12%) applied and not the Utah State prejudgment rate of ten percent (10%) towards any judgment of Parish against Donahue for unpaid alimony. The Trial Court refused to allow Rex Fuhriman to testify at the trial to explain his interpretation of the term "proceeds." Consequently, Donahue filed the instant appeal.

STATEMENT OF FACTS

Donahue and Parish were married to each other on or about October 4, 1952. In 1969, the parties acquired a house in Logan, Utah in which they resided until 1980. In 1980, the parties moved to the State of Washington; however, they did not sell their home in Logan, Utah, until June 30, 1985. (Record at 85.)

In 1980, Parish filed for divorce in the Superior Court in Washington for King County. Parish was represented by an attorney in the divorce action but Donahue was not. The parties were divorced on October 20, 1980 pursuant to a Decree of Dissolution. Parish was granted a default divorce against Donahue. (Record at 10.)

Concerning the parties' house in Logan, Utah, the Decree of Dissolution provided that it was awarded to Parish under the following conditions and restrictions:

> **B.** The home located in Logan, Utah, which home should be sold and after payment of closing costs and underlying mortgage payment, the proceeds divided equally between Petitioner (Defendant/Appellee) and Respondent (Plaintiff/Appellant). Each party should be

> required to bear any capital gains that may be occasioned proportionately with the respective proceeds that each has paid and further that Respondent is to pay all taxes owing, pertaining to said property, up to the date of the closing of the sale.

See copy of the Decree of Dissolution which is attached hereto in the Addendum and was Exhibit 1 at the trial on December 17, 1991.

On page 2 of the Decree of Dissolution, Donahue was awarded as his sole and separate property as follows:

> C. An equal share in the proceeds of the home located in Logan, Utah, on the terms and conditions as heretofore set forth.

See copy of the Decree of Dissolution which is attached in the Addendum hereto.

On June 30, 1985, the house in Logan, Utah was sold on a Real Estate Contract. (Record at 85.) The total purchase price was $68,000.00. (Record at 15.) The Contract was entered into between the Purchaser and Parish only. See Real Estate Contract which was Exhibit 3. Under the Contract, Parish received $15,000.00 as a down payment on June 30, 1985 from which closing costs and fees were subtracted in the amount of $1,559.26 for a total net down payment of $13,440.74. (Record at 20.)

The remaining indebtedness of $53,000.00 was to bear interest at ten percent (10%) per annum and to be paid pursuant to a Promissory Note which is due in full on August 1, 2000. (Record at 15.) A copy of the Promissory Note and

Real Estate Contract were Trial Exhibits 2 and 3, respectfully at the trial on December 17, 1991.

The Real Estate Contract and Promissory Note requires that Parish receive from the Buyers a monthly payment of $515.81, which she has received since August 1, 1985 and a larger payment of $5,250.00 was received by Parish on January 1, 1986. (Record at 15 and 23.) At the time of the trial of this matter in December, 1991, Parish had received seventy-eight (78) monthly payments and the January 1, 1986 payment of $5,250.00 for a total amount of payments received by Parish of $45,483.18. When the payments through December 17, 1991 were added together with the net down payment to Parish of $13,440.74, Parish had received $58,923.74 at the time of trial in December, 1991. (Record at 23.)

Donahue has not received any portion of the down payment or monthly payments under the Real Estate Contract. (Record at 20.) All of the down payment and monthly payments from the sale of the home have been received by Parish. (Record at 21.)

The total amount of principal and interest to be paid by the Purchaser to Parish under the Promissory Note is $114,820.94.

The Decree of Dissolution provided that Donahue was to pay alimony to Parish in the amount of $860.00 per month which was to terminate upon Parish's remarriage or death. (Record at 24.) See copy of Decree of Dissolution attached to the

Addendum hereto. Donahue paid some alimony to Parish; however, he was not current in his alimony obligation to Parish. Exhibit 4 of Trial Record shows the claimed payments of Donahue to Parish. Donahue claimed he owed Parish $33,655.00 in alimony at the trial. (Record at 41.) Parish introduced evidence that Donahue had failed to make alimony payments with interest at twelve percent (12%) in the amount of $50,079.02. See Exhibit 15 of Trial Record.

Parish remarried on March 19, 1986 terminating the alimony obligation of Donahue. (Record at 92.)

Donahue filed an Amended Complaint which sought the Court's determination of the term "proceeds" from the sale of the home and Parish counterclaimed for alimony arrears. A trial was held on December 17, 1991 and at the trial the District Court Judge accepted Parish's argument that the share of Donahue of the Real Estate Contract as of the date of the sale on June 30, 1985 was $66,389.95 which would entitle Donahue to one-half (1/2) of that or $33,192.48. The Trial Court found that alimony arrearages with interest at twelve percent (12%) were $50,079.02 resulting in a judgment against Donahue of $16,886.84. (Record at 140 and 141.) The Trial Court terminated any right, title and interest that Donahue had in the home and awarded the home to Parish together with a judgment in the amount of $16,886.54. (Record at 146.) See copy of Court's Order which is attached in the Addendum hereto.

SUMMARY OF ARGUMENTS

The Washington State Decree of Dissolution provides that the "proceeds from the sale of the home" are to be divided between Donahue and Parish. Donahue submits to the Court that proceeds are the total amount that is received under the Real Estate Contract and Promissory Note, which would include all of the principal and interest for the full term of the Real Estate Contract. Donahue should receive one-half (1/2) of the total amount received under the Real Estate Contract.

The judgment which was entered against Donahue in favor or Parish for unpaid alimony accrued interest as ordered by the Trial Court at the Washington State prejudgment interest rate of twelve percent (12%). This is a Utah judgment and the legal rate of interest for judgments rendered in the State of Utah should be the statutory Utah rate of ten percent (10%) per annum pursuant to Utah Code Annotated, §15-1-1 and not according to the Washington State statute.

The Trial Court wrongfully refused to allow Mr. Rex Fuhriman to testify at the trial to explain his interpretation of the term "proceeds" as an expert witness.

ARGUMENT

POINT I

THE TERM "PROCEEDS OF SALE" AS SET FORTH IN THE WASHINGTON STATE DECREE OF DISSOLUTION SHOULD BE INTERPRETED TO INCLUDE THE FULL AMOUNT OF MONEYS ACTUALLY RECEIVED BY PARISH, AND DONAHUE IS ENTITLED TO RECEIVE AN OFFSET AGAINST THE UNPAID ALIMONY FOR THE TOTAL AMOUNT RECEIVED BY PARISH UP

TO THE DATE OF TRIAL AND IS ENTITLED TO RECEIVE HIS ONE-HALF OF ANY REMAINING PROCEEDS WHICH SHOULD BE APPLIED AGAINST THE UNPAID ALIMONY BALANCE.

The Washington State Superior Court ordered in Paragraph B of the Decree of Dissolution that the parties' home in Logan, Utah was to be sold and "... after payment of closing costs and underlying mortgage payment, the proceeds divided equally between Petitioner and Respondent." Paragraph B of the Decree of Dissolution further provided that each party was to be responsible for any capital gains "... that may be occasioned proportionately with respect to the respective proceeds that each has paid and further that Respondent is to pay all taxes owing, pertaining to said property, up to the date of closing of sale." See copy of Decree of Dissolution which was Exhibit 1 in trial record. On page 2 of the Decree of Dissolution, the Court awards property to Donahue and states in paragraph C as follows: "An equal share in the proceeds of the home located in Logan, Utah, on the terms and conditions as heretofore set forth."

Therefore, Donahue was to receive under the Decree of Dissolution one-half (1/2) of the proceeds from the sale of the home located in Logan, Utah. The issue facing the Trial Court was the definition of the term "proceeds." The Trial Court found that the term "proceeds" means the total amount of the sale on the date of sale of the home minus any closing costs. The Trial Court would not include the total amount of money received by the parties for the sale of the home over

the term of the Real Estate Contract. Order dated March 9, 1992, paragraphs 5 and 7.

The Washington State Decree of Dissolution was granted to Parish as a default divorce. She was represented by an attorney. Donahue was not represented by counsel. Parish's attorney prepared the Decree of Dissolution. Any mistakes or ambiguities contained in the Decree of Dissolution should be construed against Parish.

Generally, "proceeds" are defined as "the amount proceeding or accruing from some possession or transaction." 72 Corpus Juris Secundum, Proceeds, page 973. Furthermore, it is generally held that when the term "proceeds" is implied with reference to a sale, "it usually means the entire proceeds, that is, all that was received from the sale." 72 Corpus Juris Secundum, Proceeds, pages 973-974.

In a Utah case concerning the definition of "proceeds" involving taxes, the Utah Supreme Court found that the term "gross proceeds realized" as used in the Utah Code, "means the total or whole amount in money, or other things of value, that has been realized or which the owner may receive or take possession of at his pleasure, or in which he is entitled upon demand and which accrues to him from the sale or conversion into money or its equivalent of ores extracted from the mine or mining claim." United States Smelting, Refining & Min. Co. v. Haynes, 176 P.2d 622, 625 (Utah 1947).

In the case of Furst & Thomas v. Elliott, 56 P.2d 1064 (Idaho 1936), the Idaho Supreme Court defined the word "proceeds" as used in a contract between two parties. The Idaho Supreme Court went on to hold that the definition of the term "proceeds" depends on the intention of the parties, which is to be determined by all of the surrounding facts and circumstances. Furst & Thomas v. Elliott, 56 P.2d at 1069. Furthermore, the Idaho State Supreme Court went on to set forth the following definition: "The proceeds of a sale means the entire proceeds." Furst & Thomas v. Elliott, 56 P.2d at 1068.

In a divorce case decided in the State of Washington, the Washington Court of Appeals was required to define the term "proceeds" where a lien had been granted in favor of a divorced husband against the sale proceeds of a home which was awarded to the wife. The Washington Court of Appeals held that the husband's lien on the home was limited in its terms to the proceeds "of any sale, if the home was ever sold." The Washington Court of Appeals went on to hold that "proceeds of sale in this context means moneys actually received by the seller." Kshensky v. Pioneer Nat. Title Ins. Co., 592 P.2d 667, 669 (Wash. App. 1979).

Clearly, the law in the State of Utah and from various jurisdictions generally provides that the term "proceeds" means all that is received from the sale. It is not limited to a certain date or a certain amount.

In this case, the house in Logan, Utah was sold on a Real Estate Contract and Promissory Note. (See Exhibit 2 of Trial Record.) The purchase price of the home was $68,000.00, which was to accrue interest at ten percent (10%) per annum. Parish received a down payment of $15,000.00 and another payment of $5,250.00 on January 1, 1986. The remainder of the unpaid balance was paid at $515.81 per month beginning August, 1985, and was to be paid in full on August 1, 2000. (Record at 15.) The closing costs for the sale were $1,558.26. (Record at 19.) The total proceeds during the term of the Promissory Note and Real Estate Contract would realize $114,820.94 to Donahue and Parish.

The Trial Court Judge defined "proceeds" as being the present value of the sale of the home in June, 1985, which gave Donahue a setoff of $33,192.48. The Trial Court did not consider the interest on the monthly payments that had been made to Parish or the interest and payments that would be made to her through the term of the Promissory Note until August 1, 2000. The offset ordered by the Trial Court did not include the additional payments that Parish had received through the date of trial on December 17, 1991, and the payments that Parish was to receive through August 1, 2000.

The Trial Court found that Donahue owed Parish $50,079.02 for unpaid alimony and interest at twelve percent (12%). (Record at 140 and 141.) At the trial, evidence was presented that the total amount of money received by Parish from the

date of sale to the date of trial was $58,923.74. Donahue's and Parish's share of that total amount received would be $29,461.87. (Record at 23.) Therefore, Donahue should have been given a credit against the alimony arrearages in the amount of $29,461.87. This is consistent with the definition of "proceeds" which would be the total amount realized by Parish as of the date of trial. Also, Donahue should have received interest on his share of the amounts that had not been paid by Parish to Donahue, especially in light of the fact that the Court awarded interest on the alimony not paid by Donahue to Parish.

The balance of the payments pursuant to the Promissory Note and Real Estate Contract for the purchase of the home from December, 1991 through August, 2000, is $36,506.84. The District Court should have allowed Donahue to receive one-half (1/2) of the remaining monthly payments of $515.81 until the loan balance is paid in full in August, 2000. This would allow an offset towards the alimony judgment entered against Donahue.

By accounting for the total proceeds (i.e. all of the payments, interest and receipts in this matter) the Trial Court would have taken into consideration the total amount of moneys or proceeds received and to be received by the parties under the Real Estate Contract. An interpretation of the word "proceeds" in this matter would allow Donahue to receive one-half (1/2) of the remaining amounts to be paid under the Real

Estate Contract or, in turn, allow him to have one-half (1/2) of the remaining amounts applied towards his alimony judgment. Also, it would take into consideration the possibility of foreclosure if the purchaser of the home failed to make the payments. This is a very real possibility, particularly in light of the fact that Parish testified at the trial that payments on the home were four months in arrears. (Record at 85.) If the home was taken back because of a default of payments by the purchasers, then Donahue and Parish would be able to re-sell the home and receive more gain or income from the proceeds.

Donahue did not ask the Trial Court to consider the future value of the Promissory Note against the present value of the alimony. Donahue simply requested the Court to consider and interpret the definition of "proceeds" and enter a judgment against Donahue for the alimony that was owed after subtracting the total payments and interest received by Parish through December, 1991. Donahue further requested the Court to allow him to receive one-half (1/2) of the future payments pursuant to the Real Estate Contract and apply that towards his alimony judgment. An interpretation such as this would comply with the definitions as stated above concerning the term "proceeds." That is, Mr. Donahue would be given one-half (1/2) of the proceeds of all that was received from the sale of the home.

Donahue requests this Court to remand the issue of proceeds to the Trial Court for a determination that "proceeds" means all of moneys received by Parish under the Real Estate Contract and not just one-half (1/2) of the net sales price on the date of sale.

POINT II

THE DISTRICT COURT WRONGFULLY APPLIED WASHINGTON STATE STATUTORY PREJUDGMENT RATE OF TWELVE PERCENT (12%) WHEN IT SHOULD HAVE APPLIED THE UTAH STATE PREJUDGMENT INTEREST RATE OF TEN PERCENT (10%) AGAINST ANY JUDGMENT ENTERED AGAINST DONAHUE.

Parish filed with the Trial Court a counterclaim requesting a judgment against Donahue for alimony. The Trial Court awarded a judgment against Donahue for unpaid alimony in the amount of $16,886.54. The judgment included an award of prejudgment interest on the unpaid alimony at the Washington State statutory rate of twelve percent (12%) pursuant to the Revised Code of Washington 19.52.010. See Trial Exhibit 10. Counsel for Donahue objected to the application of the Washington statutory prejudgment rate and argued that the Utah statutory prejudgment rate of ten percent (10%) should be applied. (Record at 80.)

Utah Code Annotated §15-1-1(2) provides as follows:

> (2) Unless parties to a lawful contract specify a different rate of interest, the legal rate of interest for the loan or forbearance of any money, goods, or chose in action shall be ten percent (10%) per annum.

Therefore, unless parties to a contract agree to a different rate, the legal rate for prejudgment interest in Utah is ten percent (10%) per annum. Trial courts are required as a matter of law to award the statutorily mandated prejudgment rates. Mont Trucking, Inc. v. Entrada Industries, 802 P.2d 779, 782 (Utah App. 1990).

Other states have held that the law of the state entering the judgment controls the issue of prejudgment interest awarded. See Prospero Associates v. Redactron Corp., 682 P.2d 1193, 1200 (Colo. App. 1983); In Re Air Crash Disaster at Stapleton Intern., 720 F. Supp. 1505, 1530 (D. Colo. 1989). The general rule is that the law of the forum applying the interest, determines the amount of interest unless it is expressly shown that a different law governs and in the case of doubt, the law of the forum is preferred. Gray v. Amoco Production Co., 564 P.2d 579, 583 (Kan. App. 1977).

In this case, the Trial Court applied the Washington statutory prejudgment rate of twelve percent (12%) to the Utah judgment for unpaid alimony. The Utah statutory prejudgment rate of ten percent (10%) should have been applied since this is a Utah judgment. Utah is the forum rendering the judgment and the laws of the State of Utah were applied in determining whether alimony was owed and the amount of alimony owed. Therefore, the Trial Court improperly applied the prejudgment legal rate from Washington of twelve percent (12%), when it

should have applied the prejudgment interest rate of ten percent (10%) pursuant to Utah Code Annotated § 15-1-1(2).

Donahue requests the Court to remand this matter to the Trial Court for a determination of the amount of interest on the alimony judgment at the prejudgment interest rate of ten percent (10%) and not the Washington statutory rate of twelve percent (12%).

POINT III

THE TRIAL COURT WRONGFULLY REFUSED TO ALLOW MR. REX FUHRIMAN TO TESTIFY AT THE TRIAL TO EXPLAIN HIS INTERPRETATION OF THE TERM "PROCEEDS" AS AN EXPERT WITNESS.

At the trial, Donahue attempted to call Mr. Rex Fuhriman as a rebuttal witness. (Record at 125.) Parish's attorney objected to Mr. Fuhriman being called as a surprise witness. Donahue's attorney explained to the Trial Judge that Mr. Fuhriman was being called to assist the Court in the interpretation of the term "proceeds." (Record at 126.) Mr. Fuhriman was represented to the Court as a certified and licensed real estate broker. (Record at 126.) The Trial Judge indicated that he was familiar with Mr. Fuhriman's professional credentials. (Record at 127.) The Trial Court went on to rule that it was not concerned with Mr. Fuhriman being a surprise witness but went on to state as follows:

> However, the term "proceeds" as used in the Decree of Divorce is in fact that, a term used in the Decree of Divorce. And how it may or may not be used in the real estate world is not material. Objection is sustained.

Donahue submits to this Court that the Trial Court wrongfully refused to allow Mr. Rex Fuhriman to testify at the trial as an expert witness to assist the Court in its interpretation of the term "proceeds."

Rule 702 of the Utah Rules of Evidence provides as follows:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise.

Rule 704 of the Utah Rules of Evidence provides that:

> Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trior of fact.

At trial, Donahue was simply calling an expert who had specialized knowledge to assist the trier of fact in the determination of a fact in issue, which was, the definition of "proceeds." Mr. Fuhriman was recognized by the Court to have the professional credentials as a real estate broker. (Record at 127.) Therefore, he had the technical or other specialized knowledge which would have assisted the Court as required by Rule 702 of the Utah Rules of Evidence.

Mr. Fuhriman's testimony as an expert was intended to be introduced to assist the Court in the determination of the ultimate issue of the definition of "proceeds." Opinion testimony of an expert witness is not rendered inadmissible by the fact that it may have embraced the ultimate factual issue

to be decided by the trier of fact. Shurtleff v. Jay Tuft & Co., 622 P.2d 1168, 1173 (Utah 1980). Therefore, Mr. Fuhriman's testimony cannot be excluded due to the fact that it was to be used to determine the ultimate issue of the definition of "proceeds."

Donahue submits to this Court that the testimony of Mr. Fuhriman was admissible and would assist the Court in its interpretation of the word "proceeds." He was clearly an expert in the real estate area and the Court recognized his professional credentials. The technical or other specialized knowledge of Mr. Fuhriman would have assisted the Court in its determination of the term "proceeds." Thus, the Trial Court wrongfully excluded the testimony of Mr. Rex Fuhriman to explain his interpretation of the term "proceeds" as an expert witness. Donahue requests that the Court remand this matter to the Trial Court for another trial to allow the testimony of Mr. Rex Fuhriman as an expert to assist the Court in its interpretation of the term "proceeds."

CONCLUSION

Donahue submits that the Trial Court improperly interpreted the term "proceeds" as set forth in the Washington State Decree of Dissolution. The term should be interpreted by this Court to include all of the monies actually received by Parish and all of the monies that she will receive for the full term of the Real Estate Contract. Donahue is entitled to

receive an offset against the unpaid alimony for the total amount received by Parish up to the date of trial and he is entitled to receive his one-half (1/2) of any remaining proceeds which should be applied against the unpaid alimony balance.

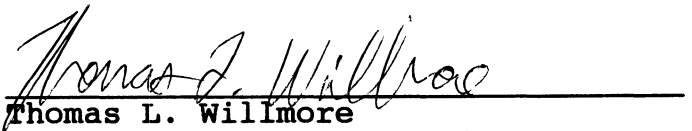
Donahue submits that the Trial Court improperly applied the Washington State statutory rate of twelve percent (12%) to the judgment for unpaid alimony against Donahue. The Trial Court should have applied the Utah State statutory prejudgment rate of ten percent (10%) pursuant to Utah Code Annotated Section 15-1-1(2).

Donahue submits that the Trial Court improperly excluded the testimony of Mr. Rex Fuhriman, who was a qualified expert. Mr. Fuhriman's testimony would have assisted the Trial Court in its interpretation of the term "proceeds" and the Trial Court should have allowed Mr. Fuhriman to testify pursuant to Rule 702 of the Utah Rules of Evidence.

Donahue respectfully requests this Court to rule in his favor on the issues raised in this appeal and reverse the decision of the Trial Court and remand this action to the District Court for a further determination of the issues presented herein.

DATED this 6th day of October, 1992.

OLSON & HOGGAN, P.C.



Thomas L. Willmore
Attorneys for Plaintiff/Appellant

CERTIFICATE OF MAILING

I hereby certify that I mailed four (4) true and exact copies of the foregoing Brief of Appellant to Defendant/Appellee's attorney, C. Richard Henriksen, Jr. at Henriksen, Henriksen & Call, 320 South 500 East, Salt Lake City, Utah 84102, Utah, this 6th day of October, 1992.

Secretary

TLW/div/donahue.bri
N-3887

ADDENDUM

1. Decree of Dissolution of October 20, 1980, from the Superior Court of Washington for King County.

2. Trial Court's Order and Findings dated March 9, 1992.

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

In Re the Marriage of: GRACE DONOHUE, Petitioner, and THOMAS J. DONOHUE, Respondent.	NO. 80-3-04990-2 DECREE OF DISSOLUTION

THIS MATTER having come on duly and regularly before the undersigned, one of the judges of the above-entitled court, on the date last shown below, the petitioner being represented by her counselor of law, H. Michael Fields of Anderson & Fields Inc., P.S. and respondent having failed to appear, although having been duly and personally served and the court being otherwise fully advised in the premises, having made its Findings of Fact and Conclusions, now, therefore, it is hereby

ORDERED, ADJUDGED AND DECREED that the marriage of the parties be and is hereby dissolved. It is further

ORDERED, ADJUDGED AND DECREED that the wife is awarded as her sole and separate property, free and clear of any interest in the husband, the following:

A. Thirteen acres located located in Logan, Utah;

B. The home located in Logan, Utah, which home should be sold and after payment of closing costs and underlying mortgage payment, the proceeds divided equally between petitioner and respondent. Each party should be required to bear any capital gains that may be occasioned proportionally with the respective proceeds that each is paid and further that respondent is to pay

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all taxes owing, pertaining to said property, up to the date of closing of said sale.

C. All personalty in her possession and/or under her respective control, including bank accounts in her name. It is further

ORDERED, ADJUDGED AND DECREED that husband is awarded as his sole and separate property, free and clear of any interest in the wife, the following:

A. All personalty in his possession and or under his respective control, icnluding bank accounts in his name;

B. All employment benefits which he may be entitled to through his employment;

C. An equal share in the proceeds of the home located in Logan, Utah, on the terms and conditions as heretofore set forth. It is further

ORDERED, ADJUDGED AND DECREED that both parties are awarded the joint legal custody of Cody, with the primary residence for Cody being provided by father/respondent,with unlimited rights of visitation awarded to the mother. It is further

ORDERED, ADJUDGED AND DECREED that respondent be and is hereby required to absorb the sole financial responsibility for the support of Cody and to pay all college expenses, including room and board,tuition, books, lab fees, and transportation, if Cody enrolls in a post-high school institution of higher learning or vocational institution to terminate at age twenty-two or attainment of a basic degree, whichever is first to occur. It is further

ORDERED, ADJUDGED AND DECREED that respondent is to pay to petitioner the amount of $860 per month as and for maintenance to terminate only upon petitioner's remarriage or death.

DONE IN OPEN COURT this 20 day of September, 1980.

OCT 20 1980

Donald M. Miles
JUDGE/COURT COMMISSIONER

Presented by:

of ANDERSON & FIELDS INC., P.S.
Attorneys for Petitioner

ANDERSON & FIELDS INC., P.S.
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IN THE FIRST JUDICIAL DISTRICT COURT IN AND FOR

CACHE COUNTY, STATE OF UTAH

THOMAS DONAHUE,	)	
Plaintiff,	)	ORDER
v.	)	Civil No. 870026212 DC
GRACE (DONAHUE) PARISH,	)	Judge Gordon J. Low
Defendant.	)	

This matter came on for trial on December 17, 1991, before the Honorable Gordon J. Low, District Judge presiding. The Defendant was present and represented by C. Richard Henriksen, Jr., and the Plaintiff was present and represented by Thomas L. Willmore. That prior to the commencement of the proceedings, both parties waived any objections they may have to having the Honorable Gordon J. Low, District Judge, preside at these proceedings, including the fact that the Court had previously represented the Plaintiff as his attorney some years ago.

That the Plaintiff was called and testified, and the Defendant was called and testified, and various exhibits were offered and received by the Court, and after the argument of counsel and after due deliberation, the Court hereby

FINDS as follows:

1. That the interest rate 12% per annum shall apply to all alimony arrearage that the Plaintiff owed the Defendant in this case pursuant to either Utah law or Washington law.

2. That the alimony arrearage that the Plaintiff owed to the Defendant as of the date of the sale of the Logan home, once owned by the parties, June 30, 1985, was larger than the one-half (½) of the net equity which was to be awarded to the Plaintiff as set forth in Page 1, Paragraph B of the Decree of Dissolution. That as of said date, the balance owing after the one-half (½) equity in the home is deducted for alimony arrearages was $9,322.83.

3. That the alimony arrearages owing from the Plaintiff to the Defendant as of February 28, 1986, the date that alimony payments ceased when offset against the equity of the home and the payments received on the Logan home, left a balance owing to the Defendant after the offset of $16,886.54.

4. That if the alimony arrearages were to be calculated against the offset in the equity in the home up to the date of trial, December 17, 1991, the amount of the alimony arrearage would be in excess of $16,886.54.

5. The Court finds that one-half of the sale proceeds from the Logan home was to be split evenly between the Plaintiff and Defendant pursuant to Page 1, Paragraph B of the Decree of Dissolution and was not done at the time.

6. The Court finds that the alimony ordered by the Decree of Dissolution was not paid as set forth in Exhibit 15.

7. At the time of the sale of the house in 1985 the Plaintiff would have been entitled to a maximum of $33,000.00, but at which time he was already in arrears in his alimony to a sum exceeding that. The best that he could hope for at that point

would be that when the house was sold that he either had one-half of the proceeds from each of the monthly installments or had the Defendant elected she could have paid in the $33,000.00. Since he was already in default in excess of that figure, his interest in the home at that time was liquidated and he was given credit for the same against the arrearages leaving a balance owed to the Defendant in the sum of $16,000.00.

8. The Court finds that all interest of the Plaintiff is vitiated in the Logan home and all interest or equity in said home is completely and entirely owned by the Defendant.

9. The Court finds that Exhibit 15 setting forth the calculations as to the amount of alimony paid with interest and the offsets is accurate. The Court finds that at least the sum of $16,886.54 is owing by the Plaintiff to the Defendant.

10. The Court finds that the alimony did not abate pursuant to an alleged agreement by the Plaintiff with the Defendant for the reason that the Court is not convinced that any agreement took place, nor was there any Court Order granting such a modification or abatement. The Court also finds that equity does not justify any abatement for the Plaintiff.

11. The Court finds that there were attorney's fees expended by the Defendant in the defense and prosecution of this matter. However, there was not sufficient evidence to establish bad faith or the fact that the Plaintiff had filed his non-meritorious case and thus, no attorney's fees are awarded.

After making said findings the Court

CONCLUDES, ORDERS AND DECREES as follows:

1. That all right to the interest, equity, or claim Plaintiff has in the equity in the Logan home once owned by the parties, and sold June 30, 1985, is vitiated.

2. That Defendant is awarded judgment against Plaintiff in the amount of $16,886.54, with interest from date of entry at 12%.

3. Each party is to bear their own attorney's fees and costs.

DATED this 9 day of March, 1992.

BY THE COURT:

/S/
GORDON J. LOW
District Court Judge

CERTIFICATE OF MAILING

I hereby certify that on this 26 day of February, 1992, a true and correct copy of the foregoing ORDER was mailed, postage prepaid, to the following individual:

Thomas L. Willmore
Attorney at Law
P. O. Box 525
Logan, Utah 84321

C Richard Henriksen, Jr